

## Chapter 2: Environmental Review

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### Introduction

The purpose of the environmental review process is to analyze the effect a CDBG-funded project may have on the people in and the natural environmental features of a project area.

Grantees who are recipients of KCDBG funds are considered responsible entities and must complete an environmental review of all project activities prior to obligating any project funds. This requirement also applies to projects funded with KCDBG-generated program income.

This chapter will cover the environmental regulations and requirements that must be followed on all KCDBG funded projects. Definitions, forms and step-by-step instructions on how to complete the environmental reviews are provided within this chapter and its attachments.

### Section 2-A. Applicable Regulations

The HUD rules and regulations that govern the environmental review process can be found at 24 CFR Part 58. The provisions of the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations in 40 CFR Parts 1500 through 1508, and a myriad of other state and Federal laws and regulations (some of which are enforced by state agencies) also may apply depending upon the type of project and the level of review required. These laws and authorities are referenced in the HUD and NEPA regulations and are listed in several of the chapter attachments.

24 CFR Part 58:  
Environmental Review

The information contained in this chapter summarizes a number of State and Federal statutes and regulations and is solely intended to give the grantee (responsible entity) an overview of its obligations in the environmental review process. Citation of these summaries may not be used as the basis for any action or inaction or as a defense in any litigation. The grantee (responsible entity) and the Environmental Certifying Officer are responsible for referring to and complying with the specific citations listed herein.

### Section 2-B. Legal Responsibilities

#### The Responsible Entity

Under 24 CFR Part 58, the term “responsible entity” (RE) means the grantee under the state CDBG Program. Therefore, these terms are used interchangeably with grantee throughout this chapter and the attachments. (The term “funding agency” is used in place of DLG, but can be interpreted to include any agency that provides funds to a project and has environmental oversight responsibilities.) The responsible entity must complete the environmental review process.

Environmental review responsibilities have both legal and financial ramifications. As part of the assurances and agreements signed by the responsible entity, the Chief Executive Officer (CEO) of the responsible entity agrees to assume the role of “responsible Federal official” under the provisions of the National Environmental Policy Act (NEPA). This means that if someone brings suit against the responsible entity in

Federal court on environmental grounds, the CEO will be named as the defendant. There may be financial implications associated with any lawsuit and, of course, any fines, judgments or settlements that may result. The Commonwealth of Kentucky accepts no responsibility or liability for the quality or accuracy of the local environmental review process. DLG's responsibility is to inform the grantee of the proper procedural requirements of various environmental statutes, regulations and executive orders and review that process.

## Environmental Certifying Officer

Under Part 58, the local chief elected or appointed official must assume the role of the Environmental Certifying Officer (ECO) or formally designate another person to do so. If the CEO does designate a staff person to serve as the ECO, this designation should be made in writing, signed by the CEO, and placed in the Environmental Review Record.

The ECO accepts full responsibility for the completeness and accuracy of the review and compliance with applicable laws and regulations. Local officials should review the municipal liability and indemnification statutes as well as the status and coverage of local liability insurance policies when accepting responsibility under environmental laws. The responsibilities of the ECO include making findings and signing required certifications.

Other key points regarding the ECO designation include:

- ✓ The ECO must be an employee of the responsible entity.
- ✓ This person does not need to be a technical expert, but should be credible if it becomes necessary to defend an environmental review.
- ✓ The ECO must be someone other than the person who actually conducts the review and completes the applicable documentation in the ERR, and who is authorized to make decisions on behalf of the grantee.

## Environmental Review Record

Each responsible entity must prepare and maintain a written record of the environmental review undertaken for each project. This written record or file is called the Environmental Review Record (ERR), and it must be available for public review.

The ERR shall contain all the environmental review documents, public notices, and written determinations or environmental findings required by 24 CFR Part 58 as evidence of review, decision making and actions pertaining to a particular project. The document shall:

24 CFR Part 58.32

- ✓ Describe the project and each of the activities comprising the project, regardless of individual activity funding source; and
- ✓ Evaluate the effects of the project or the activities on the human environment;
- ✓ Document compliance with applicable statutes and authorities; and
- ✓ Record the written determinations and other review findings required by 24 CFR Part 58.

The ERR will vary in length and content depending upon the level of review required for the categories of activities.

Public comments, concerns and appropriate resolution by the recipient are extremely important and must be fully documented in the ERR.

## **Section 2-C. Actions Triggering Environmental Review and Limitations Pending Clearance**

### **Actions Triggering the Requirements of Part 58**

Activities that have physical impacts or which limit the choice of alternatives cannot be undertaken, even with the grantee or other project participant's own funds, prior to obtaining environmental clearance. If prohibited activities are undertaken after submission of an application but prior to receiving approval from the state, the applicant is at risk for the denial of CDBG assistance. The reason is that these actions interfere with the grantee's and the state's ability to comply with NEPA and Part 58. If prohibited actions are taken prior to environmental clearance, then environmental impacts may have occurred in violation of the Federal laws and authorities and the standard review procedures that ensure compliance.

There are certain kinds of activities that may be undertaken without risking a violation of requirements of Part 58. For example, the act of either hiring a consultant to prepare a Phase I Environmental Site Assessment (an investigative study for environmental hazards), or hiring a consultant to complete an engineering design study or plan, or a study of soil and geological conditions.

24 CFR Part 58.22

### **Limitations Pending Environmental Clearance**

According to the NEPA (40 CFR 1500-1508) and Part 58, the RE is required to ensure that environmental information is available before decisions are made and before actions are taken. In order to achieve this objective, Part 58 prohibits the commitment or expenditure of CDBG funds until the environmental review process has been completed and, if required, the grantee receives a release of funds from the state. This means that the grantee may not spend either public or private funds (CDBG, other Federal or non-Federal funds), or execute a legally binding agreement for property acquisition, rehabilitation, conversion, repair or construction pertaining to a specific site until environmental clearance has been achieved. In other words, grantees must avoid any and all actions that would preclude the selection of alternative choices before a final decision is made—that decision being based upon an understanding of the environmental consequences and actions that can protect, restore, and enhance the human environment (i.e., the natural, physical, social and economic environment).

The RE should note that, on the average, an environmental review usually takes at least 45 to 60 days to complete. Environmental assessments may take longer, depending upon the environmental conditions and applicable requirements.

Note that HUD issued a new policy in April of 2011 that states that a grantee (or other project participants) cannot go to bid on activities that would be choice limiting (e.g., construction, demolition) until an environmental review is complete. This policy is based on NEPA and requires the environmental process to be completed prior to bidding in order to allow for an unprejudiced decision about the action and to allow for any modifications or project cancellation based upon the environmental review. To comply with this policy, grantees must have a signed environmental clearance from DLG prior to bid advertisement.

Moreover, until the grantee has completed the environmental review process (and received a release of funds), these same restrictions apply to project participants as well. It is the responsibility of the grantee to ensure project participants are apprised of these restrictions.

For the purposes of the environmental review process, “commitment of funds” includes:

- ✓ Execution of a legally binding agreement (such as a property purchase or construction contract);
- ✓ Expenditure of CDBG funds (e.g., hiring a consultant to prepare a preliminary design and engineering specifications or a Phase I Environmental Site Assessment);
- ✓ Use of any non-CDBG funds on actions that would have an adverse impact--- e.g., demolition, dredging, filling, excavating; and
- ✓ Use of non-CDBG funds on actions that would be “choice limiting”---e.g., acquisition of real property; leasing property; rehabilitation, demolition, construction of buildings or structures; relocating buildings or structures, conversion of land or buildings/structures

It is acceptable for grantees to execute non-legally binding agreements prior to completion of the environmental review process and receiving DLG approval. A non-legally binding agreement contains stipulations that ensure the project participant does not have a legal claim to any amount of CDBG funds to be used for the specific project or site until the environmental review process is satisfactorily completed.

It is also acceptable to execute an option agreement for the acquisition of property when the following requirements are met:

- ✓ The option agreement is subject to a determination by the grantee on the desirability of the property for the project as a result of the completion of the environmental review in accordance with Part 58; and
- ✓ The cost of the option is a nominal portion of the purchase price.

In a memo issued by HUD on August 6, 2011, the use of conditional contracts in acquisitions that involve the use of CDBG funds was clarified. A conditional contract for the purchase of property is a legal agreement between the potential buyer of a real estate property and the owner of the property. The conditional contract includes conditions that must be met for the obligation to purchase to become binding. Conditional contracts can be used in more limited circumstances than option contracts. First, conditional contracts are allowed only for residential property acquisition.

Secondly, for single-family properties (one to four units):

- ✓ The purchase contract must include the appropriate language for a conditional contract (See the text box below); and
- ✓ No transfer of title to the purchaser or removal of the environmental conditions in the purchase contract occurs unless and until the grantee determines, on the basis of the environmental review, that the transfer to the buyer should go forward and the grantee has received release of funds and environmental clearance; and
- ✓ The deposit must be refundable or, if a deposit is non-refundable, it must be in an amount of \$1,000 or less.

Finally, for multi-family properties:

- ✓ The structure may not be located in a Special Flood Hazard Area (100-year floodplain or certain activities in the 500-year floodplain);
- ✓ The purchase contract must include the appropriate language for a conditional contract (See the text box below);
- ✓ No transfer of title to the purchaser or removal of the environmental conditions in the purchase contract occurs unless and until the grantee determines, on the basis of the environmental review, that the transfer to the buyer should go forward and the grantee has received release of funds and environmental clearance; and
- ✓ The deposit must be refundable or, if a deposit is non-refundable, it must be a nominal amount of three percent of the purchase price or less.

**Language that Must be Included in Conditional Contracts for Purchase of Residential Property**

"Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the property and no transfer of title to the Purchaser may occur, unless and until [the RE name] has provided purchaser and/or seller with a written notification that: 1) it has completed a Federally-required environmental review and its request for release of funds has been approved and subject to any other contingencies in this contract, (a) the purchase may proceed or (b) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; and 2) it has determined that the purchase is exempt from Federal environmental review and a request for release of funds is not required. [RE name] shall use its best efforts to conclude the environmental review of the property expeditiously."

Please contact DLG if assistance is needed with options or conditional contract language.

## **Section 2-D. Classifying Activities and Conducting the Review**

To begin the environmental review process, the responsible entity must first determine the environmental classification of each activity in the project. This section will focus upon the five environmental classifications that are recognized under the CDBG program:

- ✓ Exempt activities;
- ✓ Categorically excluded activities not subject to Part 58.5;
- ✓ Categorically excluded activities subject to Part 58.5;
- ✓ Activities requiring an environment assessment (EA); or
- ✓ Activities requiring an environmental impact statement (EIS).

This section discusses the types of classifications and the steps required for each classification to ensure compliance with the applicable requirements.

The environmental regulations at 24 CFR Part 58.32 require the responsible entity to "...group together and evaluate as a single project all individual activities which are related geographically or functionally." Once this has been done,

24 CFR Part 58.32

the responsible entity must decide if the project is exempt, categorically excluded, or the project requires an environmental assessment or an environmental impact statement. If one activity in a project requires an assessment then the entire project must be assessed.

## Exempt Activities

Certain activities are by their nature highly unlikely to have any direct impact on the environment. Accordingly, these activities are not subject to most of the procedural requirements of environmental review. Listed below are examples, which may be exempt from environmental review. For complete details, refer to the environmental regulations at 24 CFR Part 58.

- ✓ Environmental and other studies;
- ✓ Information and financial services;
- ✓ Administrative and management activities;
- ✓ Engineering and design costs;
- ✓ Interim assistance (emergency) activities if the assisted activities do not alter environmental conditions and are for temporary or permanent improvements limited to protection, repair or restoration actions necessary only to control or arrest the effects of disasters or imminent threats to public safety or those resulting from physical deterioration;
- ✓ Public service activities that will not have a physical impact or result in any physical changes;
- ✓ Inspections and testing of properties for hazards or defects;
- ✓ Purchase of tools or insurance;
- ✓ Technical assistance or training;
- ✓ Payment of principal and interest on loans made or guaranteed by HUD; and
- ✓ Any of the categorically excluded activities subject to Part 58.5 (as listed in 58.35(a)) provided there are no circumstances that require compliance with any other Federal laws and authorities listed at Part 58.5 of the regulations. Refer to the section below on categorically excluded activities subject to Part 58.5.

24 CFR Part 58.34 (a)(12)

If a project is determined to be exempt, the responsible entity is required to document in writing that the project is exempt and meets the conditions for exemption. The responsible entity must **complete the Finding of Exemption** (sample is provided as Attachment 2-1). The form must be signed by the certifying official and a copy sent to the appropriate funding agency for review.

Attachment 2-1:  
Sample Finding of Exemption

## Categorically Excluded Not Subject to Part 58.5 Activities

The following activities, listed at 24 CFR Part 58.35(b), have been determined to be categorically excluded from NEPA requirements and are not subject to Section 58.5 compliance determinations.

24 CFR 58.35(b)

- ✓ Tenant based rental assistance;
- ✓ Supportive services including but not limited to health care, housing services, permanent housing placement, short term payments for rent/mortgage/utility costs, and assistance in gaining access to local, state and Federal government services and services;
- ✓ Operating costs including maintenance, security, operation, utilities, furnishings, equipment, supplies, staff training, recruitment, and other incidental costs;
- ✓ Economic development activities including but not limited to equipment purchase, inventory financing, interest subsidy, operating expenses and similar costs not associated with construction or expansion of existing operations;
- ✓ Activities to assist homebuyers to purchase existing dwelling units or dwelling units under construction such as closing costs, down payment assistance, interest buy downs and similar activities that result in the transfer of title to a property; and
- ✓ Affordable housing predevelopment costs with NO physical impact such as legal, consulting, developer and other costs related to obtaining site options, project financing, administrative costs and fees for loan commitments, zoning approvals, and other related activities which do not have a physical impact.
- ✓ Approval of supplemental assistance to a project previously approved under Part 58, if the approval was made by the same RE that conducted the environmental review on the original project AND re-evaluation of the findings is not required under Part 58.47. See the section later in the chapter on re-evaluation of previously cleared projects for further guidance.

To complete environmental requirements for Categorically Excluded projects not Subject to 24 CFR Part 58.5, the responsible entity must take the following steps:

- ✓ Make a finding of Exemption for activities that qualify under that category, if applicable, and put in the ERR.
- ✓ Make a finding of Categorical Exclusion Not Subject to 58.5 for activities that qualify under that category, if applicable, and put in the ERR.
- ✓ Carry out any applicable requirements of 24 CFR Part 58.6 and document the ERR.
- ✓ Make a Finding of Categorical Exclusion and place it in the Environmental Review Record (ERR).
- ✓ Complete the Request for Approval of Evidentiary Materials and Release of Funds form and submit to DLG with the Finding of Categorical Exemption Not Subject to Part 58.5.

Attachment 2-1:  
Sample Finding of Exemption  
Attachment 2-2:  
Sample Finding of Categorical  
Exclusion Not Subject  
to 24 CFR Part 58.5

Attachment 1-1:  
Sample Request for Approval  
of Evidentiary Materials  
and Release of Funds Form

The responsible entity does not have to publish or post the Notice of Intent to Request Release of Funds (NOI/RROF) or execute the environmental certification.



## Categorically Excluded Subject to Part 58.5 Activities

The list of categorically excluded activities is found at 24 CFR Part 58.35 of the environmental regulations. While the activities listed in 58.35(a) are categorically excluded from National

24 CFR Part 58.35(a)

Environmental Protection Act (NEPA) requirements, the grantee must nevertheless demonstrate compliance with the laws, authorities and Executive Orders listed in 58.5.

The following are categorically excluded activities subject to 58.5:

- ✓ Acquisition, repair, improvement, reconstruction, or rehabilitation of public facilities and improvements (other than buildings) when the facilities and improvements are in place and will be retained in the same use without change in size, or capacity of more than 20 percent.
- ✓ Special projects directed toward the removal of material and architectural barriers that restrict the mobility of and accessibility to elderly and disabled persons.
- ✓ Rehabilitation of buildings and improvements when the following conditions are met:
  - For residential properties with one to four units:
    - The density is not increased beyond four units;
    - The land use is not changed; and
    - If the building is located in a floodplain or in a wetland, the footprint of the building is not increased.
  - For multi-family residential buildings (with more than four units):
    - Unit density is not changed more than 20 percent;
    - The project does not involve changes in land use from residential to non-residential; and
    - The estimated cost of rehabilitation is less than 75 percent of the total estimated replacement cost after rehabilitation.
  - For non-residential structures including commercial, industrial and public buildings:
    - The facilities and improvements are in place and will not be changed in size or capacity by more than 20 percent; and
    - The activity does not involve a change in land use, e.g. from commercial to industrial, from non-residential to residential, or from one industrial use to another.
- ✓ An individual action on up to four-family dwelling where there is a maximum of four units on any one site. The units can be four one-unit buildings or one four-unit building or any combination in between;
- ✓ An individual action on a project of five or more housing units developed on scattered sites when the sites are more than 2,000 feet apart and there are not more than four housing units on any one site;
- ✓ Acquisition (including leasing) or disposition of or equity loans on an existing structure, or acquisition (including leasing) of vacant land provided that the structure or land acquired, financed, or disposed of will be retained for the same use.
- ✓ Combinations of the above activities.



To complete environmental requirements for Categorically Excluded projects subject to 24 CFR Part 58.5, the responsible entity must take the following steps:

24 CFR Part 58.35(a)

- ✓ Determine whether or not the project is located in or will have an impact on floodplains and/or wetlands.
  - It is highly desirable to avoid floodplains and wetlands when undertaking project activities. However, when this cannot be avoided, specific review procedures over and above the review process described earlier are required. Since development in these areas is clearly an environmental issue, the effects of these actions must be clearly articulated in the environmental review process.
  - If the project is located in the floodplain or impacts the floodplain or wetlands, the RE must complete the floodplain requirements before proceeding with the categorical exclusion, environmental assessment or environmental impact statement. The RE should be aware that most kinds of acquisition or construction (including rehabilitation) in the floodplain trigger the requirement for an environmental assessment even if those activities would have otherwise been categorically excluded. See the section, “Projects in Floodplains” later in this chapter for more information.
  - Prior to, or concurrently with, the submission for Clearinghouse review, send the SHPO Project Cover Sheet (Attachment 2-5b), and the completed Site Check, described in the SHPO Project Cover Sheet Instructions (Attachment 2-5a), to the State Historic Preservation Officer (SHPO) allowing 30 days for comments. The SHPO Project Cover Sheet describes the activities and the reviewer’s determination if the activity (or activities) will have an effect on historic preservation or not. Respond to the comments from SHPO as required and file all correspondence and evidence of response in your ERR. Be sure reliable sources are cited on each line of the checklist. All historic property reviews must be done prior to the Responsible Entity making a final determination of environmental status.
- ✓ Consultation with tribal entities is also required. See Attachment 2-6 for a Sample Tribal Consultation letter. Refer to HUD Notice 12-006 for more guidance.
- ✓ Complete the Sample Statutory Checklist for Categorically Excluded Activities/Projects (Attachment 2-4). The checklist helps to comply with the other (non-NEPA) Federal laws.
- ✓ Make a Finding of Exemption and/or Categorical Exclusion for those types of activities, if applicable, and put this form in the ERR.
- ✓ Provide Notice of Intent to Request a Release of Funds (NOI/RROF). After all required public and agency comment periods have expired and any environmental issues are resolved, the grantee must provide notice of its intent to ask DLG to release their funds (Attachment 2-7). The notice informs the public of the intention to request release of funds at least seven days after the date of publication. The notice also says that the funding agency will receive objections for at least 15 days following receipt of the request.

Attachment 2-5a: SHPO Project  
Cover Sheet Instructions

Attachment 2-5b: SHPO Project  
Cover Sheet

Attachment 2-6: Sample Tribal  
Consultation Letter

Attachment 2-4: Sample Statutory  
Checklist for Categorically  
Excluded Activities/Projects

Attachment 2-1:  
Sample Finding of Exemption  
Attachment 2-3: Finding of  
Categorical Exclusion Subject to 24  
CFR Part 58.5

Attachment 2-7: Sample Notice of  
Intent to Request a Release of  
Funds (NOI/RROF)  
Attachment 2-8: Sample Public  
Notice Distribution List

- ✓ **The NOI/RROF must be published in a newspaper of general circulation.** The grantee must retain the “tear sheet” from the newspaper evidencing that the notice was published and on what date.
- ✓ The grantee must also send a copy of the notice (NOI/RROF) to interested parties (i.e., persons and entities that have commented on the environmental process or that have requested to be notified of environmental activities), local news media, appropriate local, state and Federal agencies, the regional Environmental Protection Agency (EPA), Tribal Councils, and the HUD Kentucky State Office (Attachment 2-7).
- ✓ The grantee may also post the notice in prominent public locations (e.g., library, courthouse, etc.).

**TIP:** All time periods for notices shall be counted in calendar days. The first day of a time period begins at 12:01 a.m. local time on the day following the publication of the notice.

- ✓ After the seven-day comment period has elapsed, the responsible entity must prepare and submit the actual Request for Approval of Evidentiary Materials and Release of Funds (Attachment 1-1) and Environmental Certification (Attachment 2-9) and attachments to the appropriate funding agencies. The Environmental Certification certifies that responsible entities are in compliance with all the environmental review requirements.

Attachment 1-1: Request for Approval of Evidentiary Materials and Release of Funds  
Attachment 2-9: Sample Environmental Certification

- ✓ At the completion of the review, check the ERR to ensure that it contains the following documents:

- Finding of Categorical Exclusion (and Finding of Exemption, if applicable);
- Statutory checklist and supporting documents;
- Correspondence with the SHPO (and documentation of mitigating measures, if applicable);
- Floodplain notices and documentation of alternatives considered, if applicable;
- Full tear sheet from newspaper with Notice of Intent to Request Release of Funds; and
- Request for approval of evidentiary materials and release of funds, environmental certification and related correspondence.

Attachment 2-10: Sample Environmental Review Status

## Projects in Floodplains and Wetlands

When a project is in the 100-year floodplain or a wetland or will be a “critical action” in a 500-year floodplain, the implementation of a specific decision-making process is required for compliance with Executive Orders 11988 and 11990. A critical action is any activity for which even a slight chance of flooding would be too great, because such flooding might result in loss of life, injury to persons, or damage to property. Critical actions include activities that create, maintain or extend the useful life of those structures or facilities that: produce, use or store highly volatile, flammable, explosive, toxic or water-reactive materials; provide essential and irreplaceable records or utility or emergency services that may become lost or inoperative during flood and storm events (e.g., data storage centers, generating plants, principal utility lines, emergency operations centers including fire and police stations, and roadways providing sole egress from flood-prone areas); or are likely to contain occupants who may

See also 24 CFR Part 55

not be sufficiently mobile to avoid loss of life or injury during flood or storm events, e.g., persons who reside in hospitals, nursing homes, convalescent homes, intermediate care facilities, board and care facilities, and retirement service centers.

This decision-making procedure is commonly referred to as the “eight-step process”. The responsible entity must document that the eight-step decision-making process discussed below has been completed.

- ✓ **Step One: Floodplain Determination.** Determine if the project is located in a base (100-year) floodplain. A floodplain refers to any land area susceptible to being inundated from any source of flooding including those that can be flooded from small and often dry watercourse.
  - The maps identified below are published by the Federal Emergency Management Agency (FEMA). Check the following maps to determine if the project is located within a floodplain:
    - Flood Hazard Boundary Map; and/or
    - Flood Insurance Rate Map (both can be found here: <https://msc.fema.gov/webapp/wcs/stores/servlet/StoreCatalogDisplay?storeId=10001&catalogId=10001>).
  - If the community has been identified as flood-prone by FEMA, a copy of the community's most recently published map (including any letters of map amendments or revisions) should be obtained. The map will identify the community's special flood hazard areas.
  - If the FEMA maps are not available, a determination of whether the project is located in a floodplain may be made by consulting other sources, such as:
    - U. S. Army Corps of Engineers - Hydrology, Hydraulics, and Coastal Team;
    - Local Soil Conservation Service District;
    - Floodplain Information Reports;
    - USGS Flood-prone Area;
    - Topographic Quadrangle maps; or
    - State and local maps and records of flooding.
  - The responsible entity should request developers to provide an evaluation by an engineer or hydrologist for areas that are not covered by FEMA or these other sources. Further information may be available at the Kentucky Division of Water (DOW).
  - Use floodplain maps to make this decision and record date in the ERR

**NOTE:** If directional boring or drilling beneath a wetland is anticipated, please consult with DLG prior to undertaking the Eight-Step Process. HUD issued guidance in 2011 that exempts directional boring/drilling beneath wetlands from the Eight-Step Process *provided that* certain conditions are met.

- ✓ **Step Two: Early Public Review.** Executive Order (E.O.) 11988 includes requirements that the public be provided adequate information, opportunity for review and comment, and an accounting of the rationale for the proposed action affecting the floodplain. Involve the public in the decision making process as follows:

- **Publish a public notice in a non-legal section of the local newspaper** of general circulation to make the public aware of the intent. A sample notice is included in this manual as Attachment 2-11: Sample Floodplains and Wetlands Early Public Notice. **The Floodplains and Wetlands Early Public Notice must be published (it cannot be posted).**
- The notice must provide a complete description of the proposed action.
- The notice must allow at least a 15-day comment period for public comments.
- ✓ **Step Three: Identify and Evaluate Alternate Locations.** Determine if there is a practical alternative. This determination requires the responsible entity to consider whether the base floodplain can be avoided:
  - Through alternative siting;
  - Through alternative action that performs the intended function but would minimize harm to/within the floodplain; or
  - By taking no action.
- ✓ **Step Four: Identify Impacts of Proposed Project.** Regardless of whether the location is located within a floodplain or outside a floodplain, both the direct and indirect potential impacts must be identified and reviewed.

If negative impacts are identified, methods must be developed to prevent potential harm as discussed in Step 5. The term **harm**, as used in this context, applies to lives, property, natural and beneficial floodplain values.

- ✓ **Step Five: Identify Methods to Restore and Preserve Potential Harm to Floodplains and Wetlands Area.** If the proposed project has identifiable impacts (as identified in Step 4), the floodplains and wetlands must be restored and preserved.
  - The concept of minimization applies to harm.
  - The concept of restoration and preservation applies only in floodplain values.

Methods to be used to perform these actions are discussed in Step 6.

- ✓ **Step Six: Re-evaluate Alternatives.** At this stage, the proposed project needs to be re-evaluated, taking into account the identified impacts, the steps necessary to minimize these impacts and the opportunities to restore and preserve floodplain values.
  - If the proposed project is determined to be no longer feasible, you should consider limiting the project to make non-floodplain sites practicable.
  - If the proposed project is outside the floodplain but has impacts that cannot be minimized, the recipient should consider whether the project can be modified or relocated in order to eliminate or reduce the identified impacts or, again, take no action.
  - If neither is acceptable, the alternative is no action.

The reevaluation should also include a provision for comparison of the relative adverse impacts associated with the proposed project located both in and out of the floodplain. The comparison should emphasize floodplain values and a site out of the floodplain should not be chosen if the

Attachment 2-11:  
Sample Floodplains and Wetlands  
Early Public Notice

overall harm is significantly greater than that associated with the floodplain site.

✓ **Step Seven: Publish the Floodplains and Wetlands Notice of Explanation.** If the re-evaluation results in the determination that the only practicable alternative is to locate the project in the floodplain, the grantee must **publish** the Floodplains and Wetlands Notice of Explanation in a local newspaper of general circulation (refer to the sample in Attachment 2-12).

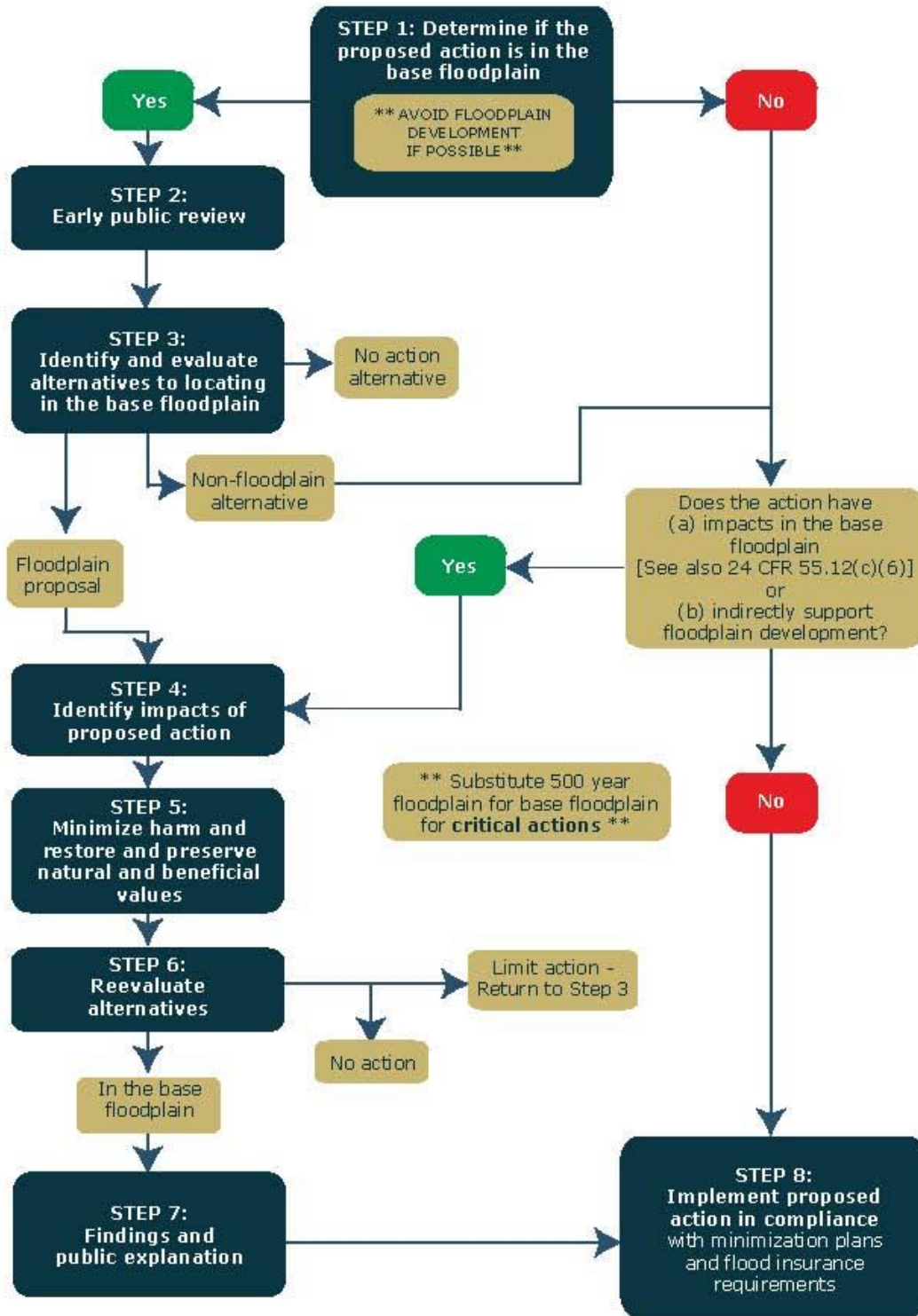
- The Floodplains and Wetlands Notice of Explanation (described previously) may **not** be posted.
- It should be noted that when a project triggers the E.O. 11988 “Eight Step Process,” the Notice of Early Public Review should be published first and the minimum 15-day comment period elapsed **before** the grantee can publish the Floodplains and Wetlands Notice of Explanation.
- The Floodplains and Wetlands Notice of Explanation can be published simultaneously with the 24 CFR Part 58 required Combined/Concurrent Notice of Finding of No Significant Impact (FONSI) and Notice of Intent to Request Release of Funds (NOI/RROF) (Attachment 2-17).
- Any written comments received in response to the above required notice must be addressed and filed in the ERR.
- Document compliance with E.O. 11988/11990 by using the sample documentation memorandum provided (See Attachment 2-13: Sample Documentation Memorandum for Floodplains/Wetlands Eight Step Process.)
- File all documentation and responses relating to the above described procedures in the ERR.

Attachment 2-12: Sample  
Floodplains and Wetlands Notice  
of Explanation

Attachment 2-13:  
Sample Documentation  
Memorandum for  
Floodplains/Wetlands  
Eight-Step Process

✓ **Step Eight: Implement the Proposed Project.** Implement the project with appropriate mitigation.

## 8- Step Decision-Making Process for Executive Order 11988





## Circumstances Requiring NEPA Review

If a responsible entity determines that an activity or project identified under the above sections about categorical exclusions (both subject to and not subject to Part 58.5) because of extraordinary circumstances and conditions at or affecting the location of the activity or project may have a significant environmental effect, it shall comply with all the requirements of 24 CFR Part 58.35(c).

24 CFR Part 58.35(c)

The responsible entity is responsible for determining that a given activity qualifies under the definitions for exclusion and/or expedited procedures. 24 CFR Part 58.2(a)(3) an activity's clearance level may be elevated if it exhibits extraordinary circumstances that affect its impact on the environment.

24 CFR Part 58.2(a)(3)

Such circumstances are defined as actions that are unique and without precedent; are substantially similar to those which would require an Environmental Assessment (EA) or Environmental Impact Statement (EIS); are unlikely to alter HUD policy or HUD mandates; or due to unusual physical conditions on the site or in the vicinity, have a potential for a significant impact on the environment or in which the environment could have a significant impact on users of the facility.

The environmental review record must contain a well-organized written record of the process and determinations made per 24 CFR Part 58.38.

## Activities Requiring an Environmental Assessment

Activities that are neither exempt nor categorically excluded (under either category) will require an environmental assessment documenting compliance with NEPA and with the environmental requirements of other Federal laws.

24 CFR 58.36 and 24 CFR 58.5

The responsible entity must be aware that if a project consists of several activities that by themselves would fall under various levels as outlined above, the responsible entity must conduct an environmental assessment on the entire project.

The responsible entity must take the following steps to complete environmental requirements for projects requiring an environmental assessment:

- ✓ Follow the instructions for categorically excluded projects subject to 24 CFR Part 58.5 to complete the statutory checklist, including the historic preservation and floodplain requirements referred to previously in this chapter under Categorical Exclusions.
- ✓ The floodplain requirements do not apply if the project is not located within a floodplain.
- ✓ Complete the Format II Environmental Assessment form. The responsible entity must ensure that reliable documentation sources are cited for every item on this assessment checklist (see Attachments 2-14 and 2-15).
- ✓ The final step in the process involves making a determination as to whether the project will or will not have a significant impact on the environment. This can be done once the review has been completed and all comments have been addressed appropriately. The Responsible Entity must select one of the following two findings/determinations:

Attachment 2-14: Format II:  
Environmental Assessment  
Attachment 2-15: Format II:  
Environmental Assessment  
Users Guide



- ✓ The project is not an action that significantly affects the quality of the human environment and, therefore, does not require the preparation of an environmental impact statement; or
- ✓ The project is an action that significantly affects the quality of the human environment and, therefore, requires the preparation of an environmental impact statement. Both the finding and the environmental assessment must be signed by your environmental certifying officer and included in the ERR. A sample checklist for completing the environmental assessment is included as Attachment 2-16.

Attachment 2-16:  
Environmental Assessment  
Process/File Checklist

### ***No Environmental Impact Statement Required***

In most instances, the environmental assessment will result in a finding that the project is not an action that significantly affects the quality of the human environment and, therefore, does not require an environmental impact statement. If this is the case, the responsible entity must complete the following:

- ✓ Provide public notice called the Combined/Concurrent Notice of Finding of No Significant Impact (FONSI) and Notice of Intent to Request Release of Funds (NOI/RROF) and Request Release of Funds from the appropriate funding agency. A sample notice is provided as Attachment 2-17.
  - The FONSI and NOI/RROF must **be published in a newspaper of general circulation**.
  - The grantee must retain the “tear sheet” from the newspaper evidencing that the notice was published and on what date.
    - The notice must also be distributed to interested parties, local news media, tribal councils, appropriate local/state/Federal agencies, regional EPA and Kentucky HUD. (See Attachment 2-8: Sample Public Notice Distribution List for a more complete listing of potentially interested parties.)
    - The notice may also be posted in public buildings within the project area.
- ✓ It is very important to remember this requires two separate 15-day review periods. A 15-day period for comment to the city/county and, after that period, a 15-day period for comment to the appropriate funding agency. The appropriate funding agency 15-day comment period does not commence until the date the appropriate funding agency receives the notice, or the date specified in the published notice, whichever is later. Call or email the appropriate funding agency to verify dates on the combined/concurrent notice before publishing.
  - Any written comments received in response to these notices must be addressed and filed in the ERR. The persons that provided the comments should be added to the distribution list of interested parties.
  - The environmental certification, request for approval of evidentiary materials and release of funds forms must be submitted to the appropriate funding agency at least 16 days after publishing the combined/concurrent notice.

Attachment 2-17: Sample  
Combined/Concurrent Notice  
to Public of No Significant  
Impact on the Environment  
and Notice to Public of Request  
for Release of Funds of Funds

Attachment 2-8: Sample Public  
Notice Distribution List

- Check the ERR. Be sure this file contains all items listed on the ERR Checklist (Attachment 2-18).

Attachment 2-18:  
Sample Environmental Review  
Record Checklist

## **Environmental Impact Statement**

An Environmental Impact Statement (EIS) is required when a project is determined to have a potentially significant impact on the environment. Consult with DLG if an EIS is anticipated.

24 CFR 58.37

24 CFR Part 58.36

## **Section 2-E. Re-Evaluation of Previously Cleared Projects**

Sometimes, projects are revised, delayed or otherwise changed such that a re-evaluation of the environmental review is necessary. The purpose of the responsible entity's re-evaluation is to determine if the original findings are still valid. If the original findings are still valid, but the data and conditions upon which they were based have changed, the responsible entity must amend the original findings and update their ERR by including this re-evaluation and its determination based on its findings. A sample determination is provided as Attachment 2-19. It has to document the following:

24 CFR 58.47

Attachment 2-19: Sample Re-  
Evaluation Determination

- ✓ Reference to the previous environmental review record.
- ✓ Description of both old and new projects activities and maps delineating both old and new project areas.
- ✓ Determination if FONSI is still valid.
- ✓ Signature of the certifying officer and date.

These four items should be sent along with the re-evaluation form (Attachment 2-19) to the appropriate funding agency with the Request for Release of Funds (RROF).

If the responsible entity determines that the original findings are no longer valid, it must prepare an EA or an EIS if the evaluation indicates potentially significant impacts.

## **Section 2-F. Environmental Reviews Prepared by or for Other Federal Agencies**

DLG will accept environmental reviews prepared by or for other Federal funding agencies provided that the ERR and associated public notifications meet or exceed the requirements established by 24 CFR Part 58 and are NEPA-like reviews. Contact DLG for further guidance.

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